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Parent Company Liability: No arguable basis to impose a duty of care on UK parent company

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Authors: Clare Connellan, Natalie Lucas, Ethan Wang, Ellen Gracey

In a decision of interest for UK-domiciled multinational companies,[1] the Court of Appeal confirmed that a UK parent company does not generally owe a duty of care to third parties who may have been affected by the operations of its foreign subsidiary.

Facts

After the announcement of the 2007 Kenyan presidential election, there was a nationwide upsurge in serious ethnic violence in Kenya, which resulted in murders, rapes, violent assaults and damaged property. Across Kenya, 1,333 people were killed and many more were injured.

During this time, employees, former employees and residents (the "**Claimants**") were living on a large tea plantation run by Unilever Tea Kenya Limited ("**UTKL**"). The Claimants alleged that UTKL and its UK-domiciled parent company, Unilever Plc ("**Unilever**"), owed them a duty of care to take adequate steps to protect them from violence, and had breached that duty.

The Court of Appeal's Reasoning

Under English law, a duty of care arises where there is proximity, foreseeability and where it is fair, just and reasonable to impose such a duty. Laing J in the High Court had found in favour of Unilever, confirming that no duty of care was owed.

The Claimants appealed the question of whether a duty of care arose, while Unilever submitted challenges on proximity, forum and case management. In their preliminary application, the Claimants had to establish the threshold of a "good arguable claim" against Unilever as the parent company, from which a claim could then be made against UKTL as a necessary or proper party. In applying this standard, the Court of Appeal found that the Claimants were "nowhere near" to showing that Unilever owed the Claimants a duty of care.

In its decision, the Court of Appeal reiterated principles from recent cases establishing when a duty of care may be imposed on a UK parent company (the "**UK Parent**"):

(i) where the UK Parent has in substance **taken over** the management of the subsidiary in place of or jointly with the subsidiary's own management;[2] and/or

(ii) where the UK Parent has given and required compliance of **relevant advice** to its subsidiary about how it should manage a particular risk. For example, a UK Parent may owe a duty of care to third parties for the products sold by its subsidiary, if it had actively enforced a

1 *AAA and others v Unilever PLC and Tea Kenya Limited* [2018] EWCA Civ 1532.

2 *Chandler v Cape Plc* [2012] EWCA Civ 525; *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528.

requirement that its subsidiaries manufacture a food product in a way that turned out to be harmful to health.[3]

On the facts, the Court of Appeal found that neither the first nor the second category applied because:

(i) Unilever was not involved in the management of UTKL; and

(ii) UTKL did not receive advice from Unilever on how to manage political risk. Instead, the evidence showed that UTKL understood that it was responsible for devising its own risk management policy.

Significance of the Decision

This is the second time this year that the Court of Appeal considered whether a UK parent may owe a duty of care to third parties for the actions of its foreign subsidiary.[4] In both cases, the Court of Appeal has found that the UK Parent did not owe such a duty of care. Save in exceptional circumstances, a UK Parent is unlikely to owe a duty of care to third parties affected by the actions of its foreign subsidiary.

In addition, these claims were partly motivated by a desire to litigate matters that occurred in a foreign jurisdiction in the English Courts. For example, the Claimants would ordinarily have brought their claims against UTKL in the Kenyan Courts. The outcome of these cases is therefore likely to deter jurisdiction shopping by foreign claimants seeking an alternative to the jurisdiction in which they are based.

However, these cases do not eliminate the risk of potential vexatious litigation from foreign claimants. Although these cases were preliminary applications, a UK Parent may still incur significant legal costs in defending itself. For example, in *Okpabi*, the "*total length of the witness statements ran to over 2,000 pages of material, quite apart from the 8 files of exhibits*".[5] As a result, these types of litigation may still be a significant financial and reputational risk for UK Parents.

Moreover, these cases provide limited guidance on what might amount to a "good arguable case" that a UK Parent owes a duty of care to third parties for the actions of its foreign subsidiary. This presents challenges for group companies in determining the level of involvement that a UK Parent should have in the day-to-day business of its subsidiary. The Court of Appeal noted that the legal principles applicable to the question of a duty owed by a UK Parent were the same as would apply in relation to "any third party", such as a "consultant giving advice", although on the facts a parent company may have greater scope to intervene in the affairs of a subsidiary. In theory, such a duty could also arise with financing parties or purchasers with specific supply chain requirements. Liability can also arise for parent companies through statutory duties. In practice, all businesses should consider human rights risk in the overall risk profile of their value chain.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 2506

3 *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191 at [196].

4 The other case is *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, which was handed down on 14 February 2018.

5 *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191 at [17].